No. 2708

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM DETTERING,

Defendant in Error,

vs.

HENRY RODEN,

Plaintiff in Error.

ERROR TO DISTRICT COURT OF WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HON. JEREMIAH NETERER, Judge.

Brief of Defendant in Error

Respectfully submitted,

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STATEMENT

Plaintiff in error in the absence of and while acting as attorney for defendant in error William Dettering, by virtue of a power of attorney made in his favor, withdrew and disposed of $17,500 in gold dust which Mr. Dettering had deposited in the Washington-Alaska Bank of Fairbanks as collateral security for a promissory note of a little over $9,000 held in that bank for collection. Upon Mr. Dettering's return to Fairbanks, Roden denied having any knowledge of what disposition had been made

of the $17,500, and claimed that it had been withdrawn and dissipated without his knowledge or consent, when in truth he had signed Mr. Dettering's name to a written agreement disposing of it to the officers of the Washington-Alaska Bank and confederates who had been litigating the rights of Mr. Dettering and others to mining property situate on Dome Creek, Fairbanks district of Alaska.

Shortly thereafter the bank failed and the $17,500 was lost to Mr. Dettering through the wrong of his attorney in signing it away and in wrongfully denying having any knowledge of its disposition.

Plaintiff in error removed the cause from the Superior Court of King County, State of Washington, in which it was brought, and now seeks, after a verdict of a jury and judgment against him, to take advantage of his own wrong by claiming the court to which he and his attorneys removed it has no jurisdiction.

The cases cited by plaintiff in error to sustain his claim were all cases which had originally been commenced in the United States courts, and none of them were cases which had been removed to the Federal Court and in which the party sought to take advantage of his own wrong upon the extremely technical point, that a citizen of a *Territory*

is not a citizen of a *State* within the meaning of the statute authorizing removal of causes to the District Courts where the necessary diversity of citizenship otherwise exists.

The language of the removal statute is less technical in that Sec. 28 Judicial Code provides:

> "Any other suit of a civil nature at law or in equity of which the district courts of the United States are given jurisdiction by this title, and which are now pending or may hereafter be brought in any state court, may be removed to the district court of the United States for the proper district by the defendant or defendants therein being NON RESIDENTS of that state."

The decisions relied on by plaintiff in error have been much criticized as technical in the extreme and unworthy of the great Chief Justice.

See *Watson vs. Brooks*, 13 Fed. 543.

The rule should not be extended to accommodate and include a case which was originally brought in the State courts and removed to the District Court, especially when no objection was made to the jurisdiction until the defendant had suffered defeat in a court of his own selection.

Plaintiff in error should be estopped from setting up and taking advantage of his own wrong.

In the case of *Talbott vs. Silver Bow County Commissioners*, 139 U. S. 438, 35 L. Ed. 210, the court held Section 5219, Rev. Stat., to include the right to tax national banks situate in the Territory of Montana, although the act by its terms only authorized the taxing of national banks situate in the states to be taxed.

The Territory of Washington was held to be a *State* within the Seaman's Act of July 20th, 1790, in the case of *In re Bryant*, Federal Cases No. 2067.

Should the court, however, feel bound to follow the decisions rendered in cases which were instituted in the Federal Courts it will then be its duty to order the cause remanded to the court from which it was wrongfully removed and to assess all the costs of both this and the District Court, including attorneys' fees, against the plaintiff in error whose wrongful act caused the removal.

In the case of *Mansfield L. M. Ry. Co. vs. Swan*, 111 U. S. 379, the taxation of costs in cases wrongfully removed is fully discussed and the costs of both courts taxed against the party wrongfully removing the case from the State Court.

In the case of *Hanrick vs. Hanrick*, 153 U. S. 191, 38 L. Ed. 688, the court says:

"Brady having wrongfully removed the

case into the circuit court must pay the costs in that court as well as the costs of the three appeals to this court."

Torrence vs. Shedd, 144 U. S. 527, 36 L. Ed. 528.
Graves vs. Corbin, 132 U. S. 571, 33 L. Ed. 462.

In the case last above cited the court says:

"Under the provision of Section 5 of the Act of March 3, 1875 (18 Stat. 472), that if in any suit removed from a state to a circuit court of the United States, it shall appear to the satisfaction of said circuit court at any time after such suit has been removed thereto, that it does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, it shall proceed no further therein, but shall remand the suit to the court from which it was removed as justice may require. This court has held that when it appears to this court that the case is one of which under the provision the circuit court should not have taken jurisdiction it is the duty of this court to reverse any judgment given below and remand the cause with costs against the party who wrongfully invoked the jurisdiction of the circuit court. *Williams vs. Nottawa Twp.*, 104 U. S. 209 (26:719). This rule has been recognized by this court to the extent even of taking notice of the want of jurisdiction in the circuit court, although the point has not been formally raised in that court or in this court in *Turner vs. Farmers Loan and Trust Co.*, 106 U. S. 552, 558; *Mansfield*,

etc., vs. Swan, 111 U. S. 379; *Farmington vs. Pillsbury,* 114 U. S. 138, 146, and *King Bridge Co. vs. Otoe County,* 120 U. S. 225."

Martin vs. Snyder, 148 U. S. 662, 37 L. Ed. 602.

Mattingly vs. Northwestern Virginia R. R. Co., 158 U. S. 53, 39 L. Ed. 894.

Pellett vs. Great Northern Ry. Co., 105 Fed. 194.

The case of *Stevens vs. Nichols,* 130 U. S. 230, 32 L. Ed. 914, was one in which it was sought to have applied in satisfaction of a judgment obtained against a car company amounts due from two of its subscribers to its capital stock. The stock subscribers removed the cause to the Circuit Court of the United States, where it was tried without objection being made to that court's jurisdiction. Upon appeal by the stock subscribers to the Supreme Court it was held the petition for removal was insufficient, and the cause was ordered remanded to the State Court with direction that the person who caused the removal pay all costs of the Supreme and Circuit Courts.

Respectfully submitted,

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